

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Sylvester Thompson, | : | |
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| Plaintiff, | : | |
| | : | |
| v. | : | Case No. 2:14-cv-37 |
| | : | |
| Rosenthal, Stein & | : | JUDGE JAMES L. GRAHAM |
| Associates, et al., | : | Magistrate Judge Kemp |
| | : | |
| Defendants. | : | |

REPORT AND RECOMMENDATION

Plaintiff Sylvester Thompson brought this action against Rosenthal, Stein & Associates, and two individuals, Agent Dickson, and Agent Davis alleging that they violated the Federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692k, Ohio's Consumer Sales Practices Act ("OCSA"), O.R.C. §§ 1345.02 and/or 1345.03, and his common law right to privacy. The Clerk has entered default against all Defendants pursuant to Federal Rule of Civil Procedure 55(a) for failing to plead or otherwise defend this action. On April 7, 2014, Plaintiff Thompson filed a motion for default judgment (Doc. 10) seeking an award of damages and attorney fees. On July 30, 2014, Judge Graham referred the motion for default judgment to the Magistrate Judge for a report and recommendation (Doc. 13).

On November 14, 2014, the Magistrate Judge held a default judgment hearing at which Mr. Thompson testified regarding the damages owed to him. Defendants did not appear at the hearing or otherwise contest the amount of the alleged damages. At the end of the hearing, the Magistrate Judge requested a supplemental motion for attorney fees, which Plaintiff filed (Doc. 15). Mr. Thompson seeks \$5,000.00 in damages and a total of \$9,476.70 in attorneys' fees and costs. For the following reasons, it is

recommended that the motion for default judgment and the supplemental motion for attorney fees and costs be granted.

I.

The Court first turns to the request for damages. Having suffered an entry of default, Defendants' liability is established. Antoine v. Atlas Turner, Inc., 66 F.3d 105, 110-111 (6th Cir. 1995). The plaintiff, however, must still establish the proper amount of damages to be awarded. Id.

The FDCPA provides, in pertinent part:

(a) Amount of damages Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of - (1) any actual damages sustained by such person as a result of such failure;(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1000; . . . and (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. . . .

15 U.S.C. § 1692k(a). The Ohio Consumer Sales Practices Act provides in relevant part:

(A) Where the violation was an act prohibited by section 1345.02, 1345.03, or 1345.031 of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover the consumer's actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages.
(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover . . . three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater,

plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

Ohio Rev. Code Ann. § 1345.09 (West). A violation of Ohio's common law right to privacy also permits actual damages. See Housh v. Peth, 165 Ohio St. 35, 40, 133 N.E.2d 340, 344 (Ohio 1956) (upholding the trial court's jury charge instructing that "where the right of privacy is invaded, the person injured is entitled to recover substantial damages although the only damages suffered by her result from mental anguish").

Mr. Thompson seeks statutory and actual damages under the various causes of action totaling \$5,000.00 without any discussion of what portion of that amount would be attributable to actual damages and what portion would be statutory damages. (Doc. 10 at Decl. of Edward A. Icove). Statutory damages alone could not justify an award of \$5,000.00 in this case, so the request for damages necessarily requires a discussion of actual damages. The misconduct for which Defendants have been adjudged liable is the same for each cause of action, so Mr. Thompson's request for compensatory damages under the FDCPA and the OSCPA and common law will be discussed together. See Dowling v. Litton Loan Servicing, LP, No. 2:05-CV-0098, 2006 WL 3498292, at *14 (S.D. Ohio Dec. 1, 2006) ("a plaintiff who alleges separate causes of action is not permitted to recover more than the amount of damage actually suffered; there cannot be double recovery for the same loss, even though different theories of liability are alleged in the complaint.") (citations omitted).

Under both the FDCPA and the OCSA, evidence of emotional distress caused by violations of those acts may result in actual damages. See, e.g., Boyce v. Attorney's Dispatch Serv., No. C-3-94-347, 1999 WL 33495605, at *1 (S.D. Ohio Apr. 27, 1999) ("All

of those actions caused the Plaintiffs to suffer harm, for which they are entitled to recover damages under both the FDCPA and the OCSA. 15 U.S.C. § 1692k(a)(1); Ohio Rev.Code § 1345.09(A). In particular, the Court finds that the Plaintiffs have suffered harm in the form of emotional distress, humiliation and embarrassment."); see also Dowling v. Litton Loan Servicing LP, 320 F. App'x 442, 445 (6th Cir. 2009) (noting that, regarding the plaintiffs' FDCPA claim, "the court awarded Dowling \$25,000 in actual damages for her emotional distress [plus \$1000 in statutory damages] for a total recovery of \$26,000 plus attorney's fees and costs."); Ohio Rev. Code Ann. § 2315.18(4) (West) (defining "Noneconomic loss" as including "pain and suffering," and "mental anguish, and any other intangible loss").

At the default judgment hearing, Mr. Thompson testified about Defendants' conduct and how that affected him. He testified that in February of 2013, Defendant Agent Dickson contacted Mr. Thompson, identified himself as "Agent Dickson," and told him that he had to pay that day or he would be turned over to the Franklin County Sheriff for pickup. Mr. Thompson understood that to mean that he would be arrested. Mr. Thompson told Agent Dickson that he had a lawyer and gave him the lawyer's name and phone number. Mr. Thompson testified that Agent Dickson called back the same day to ask if Mr. Thompson could borrow the money. The next day, another individual, who identified herself as "Agent Davis," called and told Mr. Thompson that he could be arrested for theft if he did not pay. Mr. Thompson told Agent Davis to call his lawyer, and she said that Agent Dickson had called the lawyer. Mr. Thompson paid \$105 that day. Mr. Thompson testified that Defendants called three times in March, but he saw the caller number and did not answer the telephone.

Mr. Thompson testified that Defendants' calls scared him. Because they identified themselves by the title "Agent," he was

worried that they were with the FBI. He understood their calls to be threatening to arrest him for theft. He couldn't sleep and he left his home for two or three weeks and stayed with friends. He was also somewhat embarrassed. He continued to have trouble sleeping for four to five months, and every once in a while he still has trouble sleeping. He saw a doctor and was proscribed some sleeping medicine which he took.

In Boyce v. Attorney's Dispatch Serv., No. C-3-94-347, 1999 WL 33495605, at *1 (S.D. Ohio Apr. 27, 1999), the Court found the conduct of the defendants particularly egregious because of (1) the number of statutory violations in two letters sent to one of the plaintiffs, (2) the "outrageous" content of telephone calls to one of the plaintiffs including the caller identifying himself as "Officer Martin" and "indicat[ing] that [one of the plaintiffs] could face criminal prosecution if he did not pay the debt that he owed" to one of the defendants, and (3) the fact that the caller for one of the defendants informed one of the plaintiffs co-workers that he was "Officer Martin," which required the plaintiff to explain matters to a co-worker. In that case the Court found that the plaintiffs had suffered harm in the form of emotional distress, humiliation and embarrassment, which was mitigated to some degree by the fact that their attorney must have been able to allay their fears of criminal prosecution soon after the calls, there was no finding that the actions of the defendants caused one of the plaintiffs to leave his job or caused either plaintiff to suffer a medical condition requiring professional treatment. The court awarded \$6,000.00 in compensatory damages for one plaintiff and \$4,000.00 in compensatory damages for the other plaintiff, as well as \$1,000.00 in statutory damages under the FDCA for each plaintiff and \$2,500.00 in punitive damages under the OCSA.

Here, Defendant's conduct differed slightly from the

defendants in Boyce. However, Mr. Thompson was similarly harmed in that he feared Defendants' association with the FBI, was worried that he would be arrested, and suffered some degree of humiliation and embarrassment from the calls. The Court recommends awarding compensatory damages in the amount of \$4,000.00 to Mr. Thompson.

The FDCPA also permits statutory damages of up to \$1,000.00 as the court may allow. 15 U.S.C. § 1692k(a)(2)(A). In fashioning a proper award of statutory damages here, the Court must examine the particular FDCPA violation found in the context of the various factors set forth in the FDCPA. These factors include: "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional...." 15 U.S.C. § 1692k(b)(1). To reach the proper award, the Court will consider and balance each of these factors against the FDCPA's purpose, which is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504, 508 (6th Cir. 2007) (quoting 15 U.S.C. § 1692(e) (internal quotation marks omitted)). Here, as in Boyce, Defendant violated the FDCPA in numerous ways on more than one occasion, and such actions can most reasonably be viewed as affirmative misrepresentations rather than merely an oversight. Accordingly, the Court recommends awarding statutory damages pursuant to the FDCPA in the amount of \$1,000.00.

Mr. Thompson has not sought punitive damages, and statutory damages pursuant to the OCSA are only permitted as an alternative to compensatory damages, and are, therefore, not permitted here.

II.

Next, the Court turns to the supplemental motion for attorney fees. Both the FDCPA and the OCSA permit a prevailing plaintiff to recover costs, including reasonable attorney's fees. See 15 U.S.C. § 1692k(a)(3) & Ohio Rev. Code § 1345.09(F)(1). The Court of Appeals has held that the FDCPA mandates such an award. Dowling v. Litton Loan Servicing LP, 320 F. App'x 442, 446 (6th Cir. 2009) (citations omitted). In determining what constitutes a reasonable award of attorney fees, the Court first determines the lodestar amount, which is "calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." Imwalle v. Reliance Med. Prod., Inc., 515 F.3d 531, 551-52 (6th Cir. 2008) (citing Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). "Where the party seeking the attorney fees has established that the number of hours and the rate claimed are reasonable, the lodestar is presumed to be the reasonable fee to which counsel is entitled." Imwalle, 515 F.3d at 552 (citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 564-65, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)). "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." Hensely, 461 U.S. at 433.

In any context where an attorney requests fees to be awarded by the Court, there is an obligation to award only reasonable fees. While the Court has substantial discretion in determining what is a reasonable fee, there are a number of factors which should be considered, including the prevailing market rates for comparable legal work in the community, whether the amount of time for which compensation is requested is reasonably necessary to perform the tasks described, and whether the representation

was of at least average quality. See Kauffman v. Sedalia Med. Ctr., Inc., No. 2:04-CV-543, 2007 WL 490896 at *3 (S.D. Ohio Feb.9, 2007) (citing Bemis v. Hogue, Nos. 89-1697, 89-1767, 1991 WL 102385, at *7 (6th Cir. Jun 13, 1991)).

To determine whether a billing rate is reasonable, courts should assess the prevailing market rate in the relevant community, which is the rate that "lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record...." Adcock-Ladd v. Secretary of Treasury, 227 F.3d 343, 350 (6th Cir. 2000) (citations omitted). "A district court may rely on a party's submissions, awards in analogous cases, state bar association guidelines, and its own knowledge and experience in handling similar fee requests." Van Horn v. Nationwide Prop. and Cas. Ins. Co., 436 Fed. Appx, 496, 498-99 (6th Cir. Aug. 26, 2011).

Here, the declarations of the attorneys seek lodestar amounts as follows: \$5,880.00 for Mr. Icové, calculated based on 14.7 hours at \$400.00 per hour; \$3,500 for Mr. Varnado, calculated based on 14.0 hours at \$250.00 per hour; and fees for a paralegal, Ms. Laurich, totaling \$75.00, calculated based on .6 hours at \$125.00 per hour.

Turning first to the hourly rates, the Court notes that it has previously approved Mr. Icové's billing rate of \$400.00, and the reasoning in that case continues to hold true:

Here, Attorney Icové avers that his hourly rate has increased incrementally over the years in practice, which included his being awarded a fee of \$300.00 in 2008. . . . The Court has no reason to doubt that the rate of \$400.00 represents Attorney Icové's current billing rate or that an attorney of his skill and experience in a comparable market could reasonably charge that amount on a hourly basis. In Wells v. Rhodes, No. 2:11-CV-217, 2012 WL 3835391, at *2 (S.D. Ohio 2012), Judge Sargus approved an hourly rate of \$400.00 for an attorney who possessed considerable experience, when that attorney worked in combination

with an attorney with a much lower hourly rate. Applying the decision in Wells to this case, the Court finds that \$400.00 is reasonable based on Attorney Icové skill and experience when combined with [co-counsel's] lower hourly rate. Further, because the work performed in this case required an attorney with skill and experience in consumer law, the Court finds Attorney Icové's hourly rate to be reasonable.

Hagy v. Demers & Adams, LLC, No. 2:11-CV-530, 2013 WL 5728345, at *13 (S.D. Ohio Oct. 22, 2013), appeal dismissed (Apr. 22, 2014). Mr. Varnado, who has more than 30 years of experience practicing law in Ohio, seeks a rate that is significantly lower than Mr. Icové, and is reasonable. Likewise, the billing rate of Ms. Laurich, Mr. Icové's paralegal, is reasonable.

In addition, the Court has reviewed the time records attached to the attorney declarations, and the hours expended appear reasonable. Plaintiff also seeks \$21.70 for postage for service of process, which appears reasonable. Consequently, the Court will recommend an award of \$9,455.00 in attorneys' fees plus \$21.70 in costs.

III.

For these reasons, it is recommended that the motion for default judgment (Doc. 10) and the supplemental motion for attorney fees (Doc. 15) be granted and that Mr. Thompson be awarded \$5,000.00 in damages and a total of \$9,476.70 in attorneys' fees and costs.

IV.

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a de novo determination of those portions of the report or specified proposed findings or

recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the district judge review the Report and Recommendation de novo, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. See Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

/s/ Terence P. Kemp
United States Magistrate Judge